

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TIMMY O'NEIL CHARITY,

Petitioner,

v.

PERRY PHELPS, Warden,

Respondent.

Civil No. 08-1530 JLS (WMc)

ORDER:

**(1) CONSTRUING ACTION AS A
 PETITION FOR WRIT OF HABEAS
 CORPUS PURSUANT TO 28 U.S.C. §
 2254, and**

**(2) DISMISSING CASE WITHOUT
 PREJUDICE**

Presently before the Court is Timmy O'Neil Charity's ("Petitioner") petition for writ of habeas corpus. Although Petitioner filed this action pursuant to 28 U.S.C. § 2241, he is a state prisoner attacking the validity of a state court conviction and sentence imposed by the state of California. Specifically, Petitioner contends that the California Department of Corrections breached the terms of his plea agreement in its computation of Petitioner's minimum eligible parole date. (Pet. at 3.) Therefore, Petitioner may not proceed under section 2241, but may only proceed with a habeas action in federal court under 28 U.S.C. § 2254. *White v. Lambert*, 370 F.3d 1002, 1006-07 (9th Cir. 2004) (holding that section 2254 is the proper jurisdictional basis for a habeas petition brought by an individual "in custody pursuant to a state court judgment"). The Court therefore, will construe this action as one brought pursuant to 28 U.S.C. § 2254.

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3 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

4 Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma
5 pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or
6 qualified to proceed in forma pauperis. See Rule 3(a), 28 U.S.C. foll. § 2254.

7 **FAILURE TO USE PROPER FORM**

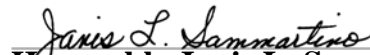
8 Additionally, a Petition for Writ of Habeas Corpus must be submitted in accordance with
9 the Local Rules of the United States District Court for the Southern District of California. See
10 Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be
11 submitted upon a court-approved form and in accordance with the instructions approved by the
12 Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-
13 approved form.

14 **CONCLUSION AND ORDER**

15 Accordingly, the Court **CONSTRUES** the instant action as a habeas petition brought
16 pursuant to 28 U.S.C. § 2254. The Court **DISMISSES** the action for Petitioner's failure to
17 either pay the \$5 filing fee or move to proceed in forma pauperis, and failure to use the proper
18 form. If Petitioner wishes to proceed with this case, he must submit, **no later than October 21,**
19 **2008,** a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the
20 fee, **AND** a First Amended Petition on a Court approved form. **The Clerk of Court is directed**
21 **to send a blank Southern District of California In Forma Pauperis Application, and a**
22 **blank § 2254 First Amended Petition form to Petitioner along with a copy of this Order.**

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24 **IT IS SO ORDERED.**

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26 **DATED: August 25, 2008**

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28 **Honorable Janis L. Sammartino**
United States District Judge